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**Professional Transportation, Inc. and International Brotherhood of Teamsters Local 512.** Case 12–CA–101034

April 2, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

On October 22, 2013, Administrative Law Judge William Nelson Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>1</sup> and conclusions, to amend the remedy, and to adopt the recommended Order as modified.<sup>2</sup>

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act in two respects. First, in February and March 2013, the Respondent canceled seven consecutive bargaining sessions scheduled for those 2 months. Second, beginning on May 31, 2013, the Respondent conditioned bargaining on the Union’s agreement that, if a court of competent jurisdiction determined that the Board lacked a quorum when the Region certified the Union as the bargaining representative, then any contract executed by the parties would be null and void and the Respondent would withdraw its recognition of the Union. For the reasons discussed below, we affirm both violations.

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<sup>1</sup> The Respondent has implicitly excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall modify the judge’s recommended Order to conform to the amended remedy, and we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

I. FACTS

On June 5, 2012, the Regional Director for Region 12 certified the Union as the bargaining representative for a unit of the Respondent’s employees. The Union immediately requested bargaining dates, but the Respondent was initially unable to meet because of scheduling conflicts. The parties held their first bargaining session on September 25, 2012. Thereafter, they met twice in November and once more in late January 2013.<sup>3</sup> Concerned that the negotiations were “dragging,” the Union urged the Respondent to agree to more negotiation dates. The parties scheduled meetings for February 21 and 22, and for March 5, 6, and 7. But on February 13, the Respondent canceled the February 21 and 22 bargaining sessions, claiming that it was still drafting counterproposals. On February 25, the Respondent canceled the March 5, 6, and 7 bargaining sessions when its negotiator asserted that he had a “major conflict” that he had previously overlooked. The parties scheduled March 21 and 22 as the next bargaining dates.

On March 19, the Respondent canceled the March 21 and 22 bargaining sessions, citing its need to review the possible ramifications of the D.C. Circuit’s January 25 decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), affd. in part 134 S.Ct. 2550 (2014).<sup>4</sup> On April 22, the parties agreed to meet on June 4, 5, and 6. On May 31, the Respondent notified the Union that the Respondent “is bargaining subject to a reservation of rights based upon the reasoning expressed in the ‘Noel Canning’ line of federal appeals court cases issued by the DC and 3rd circuits.” In a June 3 email, the Respondent informed the Union that it would negotiate only if the Union would agree that the Respondent’s obligation to recognize the Union and abide by any collective-bargaining agreement would be nullified if “a court of competent jurisdiction” determined that the Board lacked a quorum when the Union was certified. By reply email, the Union reiterated its willingness to bargain, but not under the Respondent’s conditions.

At the June 4 session, the Respondent repeated its position regarding *Noel Canning* and asserted that the Union was agreeing to this “conditional bargaining” by participating in the bargaining session. The Union again stated that it would not agree to that condition but was otherwise willing to negotiate. After a 15-minute caucus,

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<sup>3</sup> All dates hereinafter are in 2013 unless otherwise indicated.

<sup>4</sup> The Respondent had not raised any concerns during the representation proceeding or at any prior bargaining session about whether the Board had a quorum at the time of the Union’s certification.

the Respondent reiterated its demand for conditional bargaining. The Union refused, and the Respondent stated that “there was no need in proceeding forward.” At that point, the bargaining session concluded, and no further sessions were held.

## II. DISCUSSION

### A. Cancellation of Bargaining Sessions

Section 8(a)(5) and (d) of the Act requires the Respondent to meet at reasonable times and bargain in good faith with the Union regarding wages, hours, and other terms and conditions of employment of bargaining unit employees. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). In agreement with the judge, we find that the Respondent violated Section 8(a)(5) and (1) by canceling the seven consecutive bargaining sessions in February and March. These cancellations clearly established an impermissible pattern of dilatory conduct by the Respondent. See *Lancaster Nissan*, 344 NLRB 225, 227–228 (2005) (finding 8(a)(5) violation where employer met with union 12 times during the certification year, but ignored union’s request for additional meetings and canceled several bargaining sessions), *enfd.* 233 Fed.Appx. 100 (3d Cir. 2007); *Calex Corp.*, 322 NLRB 977, 978 (1997) (finding 8(a)(5) violation where parties had 19 bargaining sessions in 15 months following union certification, but employer canceled a number of bargaining sessions because of various asserted scheduling problems), *enfd.* 144 F.3d 904 (6th Cir. 1998).<sup>5</sup>

### B. Conditional Bargaining Demand

We also agree with the judge that the Respondent violated Section 8(a)(5) and (1) by insisting to impasse that if the D.C. Circuit’s opinion in *Noel Canning* was upheld, any collective-bargaining agreement reached by the parties would be nullified and the Respondent would no longer recognize the Union. In our view, the Respondent’s position—which it first asserted on May 31, 2013—was a belated attempt to challenge the Regional Director’s June 2012 certification of the Union.

The Respondent had ample opportunities during the representation proceeding to contest the validity of the election.<sup>6</sup> Instead, the Respondent executed a Stipulated Election Agreement with the Union and, in the absence

of any objections to the election, which the Union won, the Regional Director certified the Union. Thereafter, the Respondent did not contest the certification; instead, it began bargaining with the Union. Under these circumstances, the Respondent waived its right to challenge the validity of the underlying representation proceeding or the Union’s certification. See *Manhattan Center Studios*, 357 NLRB No. 139, slip op. at 2 (2011) (“It has long been established that a party may not relitigate in an unfair labor practice proceeding any issue that was or could have been raised in the underlying representation proceeding.”); *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921, 922 fn. 6 (1997) (“[T]he courts have held that where, as here, ‘an employer honors a certification and recognizes and begins bargaining with the certified representative, it waives a contention that the election and certification are invalid’”) (quoting *King Radio Corp. v. NLRB*, 398 F.2d 14, 20 (10th Cir. 1968)); *NLRB v. Newton-New Haven Co.*, 506 F.2d 1035, 1038 (2d Cir. 1974) (holding that employer, by failing to file a timely objection, waived the right to challenge a Board procedure that the court found invalid—in a case involving a different party—after the Board had issued its decision against the employer). Accordingly, the Respondent violated Section 8(a)(5) and (1) by agreeing to bargain only if the Union accepted its conditional bargaining demand.<sup>7</sup>

Furthermore, and regardless of whether the Respondent’s conduct amounted to an untimely challenge to the Union’s certification, the Respondent’s conditional bar-

<sup>5</sup> The judge issued his decision prior to the Supreme Court’s ruling in *Noel Canning*. In finding the Respondent’s conduct unlawful, the judge reasoned that, even if the Court found the recess appointments to the Board invalid (as it ultimately did), the Board could, if it chose, “reaffirm [its] earlier actions related to the certification of representative.” We need not do so, however. It was the Regional Director—not the Board—that certified the Union. The Board delegated decisional authority in representation cases to Regional Directors in 1961, and that delegation has never been revoked. See *Avenue Care & Rehabilitation Center*, 361 NLRB No. 151 (2014).

In its exceptions, the Respondent argues for the first time that the Regional Director, Margaret Diaz, lacked authority to certify the Union because she was appointed at a time when the Board lacked a quorum. This argument is untimely because the Respondent failed to raise it during the representation proceeding. See *ManorCare of Kingston PA*, 361 NLRB No. 17, slip op. at 1 fn. 1 (2014). Moreover, even assuming that the Respondent’s challenge to the Regional Director’s authority was not otherwise barred, the Board previously issued an order contingently delegating authority to the General Counsel to appoint regional directors in the absence of a Board quorum. See *Pallet Companies, Inc.*, 361 NLRB No. 33, slip op. at 1 (2014). The Respondent’s argument is additionally without merit because, on July 18, 2014, in an abundance of caution and with a full complement of five Members, the Board ratified *nunc pro tunc* and expressly authorized the selection of Ms. Diaz as Regional Director. Lastly, on July 30, 2014, Regional Director Diaz affirmed and ratified any and all actions taken by her or on her behalf from the date of her initial appointment to July 18, 2014.

<sup>5</sup> In finding the violation, we do not rely on *Enjoi Transportation, LLC*, 358 NLRB No. 158 (2012), cited by the judge. We also do not rely on the judge’s citation to *Camelot Terrace*, 357 NLRB No. 161 (2011), because no party excepted to the relevant findings in that case and, therefore, the proposition for which it was cited by the judge was not before the Board.

<sup>6</sup> The recess appointments at issue in *Noel Canning* occurred in January 2012. The election in this case was held on May 16 and 17, 2012.

gaining demand did not involve wages, hours, or other terms and conditions of employment, and was therefore a permissive subject of bargaining. See *NLRB v. Borg-Warner Corp.*, 356 U.S. at 349. Accordingly, the Respondent acted unlawfully by insisting on its bargaining demand to the point of impasse. See *Success Village Apartments*, 347 NLRB 1065, 1068 (2006).<sup>8</sup>

#### Amended Remedy

The General Counsel cross-excepts to the judge's failure to impose a bargaining schedule, as sought in the complaint, asserting that it is necessary to fully remedy the Respondent's unfair labor practices. We agree. As discussed above, prior to the Respondent's unlawful conduct in February, the parties had met for only four bargaining sessions since the Union's certification in June 2012. Once the Union started pressing the Respondent to negotiate more frequently, the Respondent canceled seven consecutive bargaining sessions without valid reasons and then insisted to the point of impasse that the Union agree to its conditional bargaining demand. Under the circumstances here, where the Respondent has engaged in a series of dilatory tactics in contravention of its duty to bargain in good faith, we

believe that a bargaining schedule requiring the Respondent to meet and bargain with the Union on a regular and timely basis is appropriate and would best effectuate the purposes of the Act. See *All Seasons Climate Control, Inc.*, 357 NLRB No. 70, slip op. at 1 fn. 2 (2011) (ordering employer to comply with a bargaining schedule to remedy its unlawful conduct), enf'd. 540 Fed.Appx. 484 (6th Cir. 2013). The General Counsel proposes that, upon the Union's request, bargaining sessions should be held for a minimum of 24 hours per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees. We find this proposed schedule, which will promote regular meaningful bargaining between the parties, to be appropriate here. We shall also require the Respondent to submit written bargaining progress reports every 30 days to the compliance officer for Region 12, serving copies thereof on the Union. See id.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Professional Transportation, Inc., Jacksonville, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Within 15 days of the Union's request, bargain with the Union at reasonable times and places in good faith as the exclusive bargaining representative of its employees in the above-described bargaining unit with respect to wages, hours, and other terms and conditions of employment until a full agreement or a bona fide impasse is reached, and if an understanding is reached, embody the understanding in a written agreement. Upon the Union's request, such bargaining sessions shall be held for a minimum of 24 hours per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees. Respondent shall submit written bargaining progress reports every 30 days to the compliance officer for Region 12, serving copies thereof on the Union.”

2. Insert the following as paragraph 2(e).

“(e) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.”

3. Substitute the attached notice for that of the administrative law judge.

<sup>8</sup> The Board has previously found that conditioning bargaining on pending litigation, as the Respondent did in this case, does not constitute bargaining in good faith. See *Fred Meyer Stores, Inc.*, 355 NLRB 179, 179 fn. 1 (2010) (employer engaged in unlawful conditional bargaining by, among other things, proposing to delay bargaining until “the question of the Board's statutory authority to issue decisions is resolved by the Supreme Court”), incorporated by 355 NLRB 629 (2010), enf'd. 466 Fed.Appx. 560 (9th Cir. 2012); see also *Bob's Big Boy Family Restaurants*, 264 NLRB 432, 434 (1982) (“It is well settled that collateral litigation does not suspend the duty to bargain under Section 8(a)(5).”).

Member Miscimarra agrees that an employer normally waives its right to challenge a union's certification based on arguments not raised in the representation case, but he notes that some courts have held that the absence of a quorum, to the extent it would invalidate certain Board actions, either raises a jurisdictional question that cannot be waived, *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 210-213 (3d Cir. 2013), or presents extraordinary circumstances warranting review even though not previously raised, *Noel Canning v. NLRB*, 705 F.3d 490, 496-498 (D.C. Cir. 2013), aff'd. 134 S. Ct. 2550 (2014). However, Member Miscimarra finds it is unnecessary to determine whether Respondent timely raised its potential objection regarding *Noel Canning* because Respondent's bargaining position—that (quoting the judge's decision) “if the Union met to negotiate it would, by its actions, be agreeing to *accept* the Company's conditions” (emphasis added)—constituted a take-it-or-leave-it position that precluded *any* bargaining over the matter at issue (i.e., the potential impact on the parties or their agreement if *Noel Canning* were upheld). See *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960) (“Collective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of ‘take it or leave it . . . .’”); see also *NLRB v. General Electric Co.*, 418 F.2d 736, 762 (2d Cir.1969), cert. denied 397 U.S. 965 (1970).

Dated, Washington, D.C. April 2, 2015

Mark Gaston Pearce,	Chairman
Philip A. Miscimarra,	Member
Kent Y. Hirozawa,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX  
NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to meet at reasonable times, insist on improper conditional bargaining, and fail and refuse to bargain in good faith with the International Brotherhood of Teamsters Local 512 (the Union) as your exclusive collective-bargaining representative in the following appropriate bargaining unit:

All full time and regular part-time over the road and local drivers working from the Respondent's [Company's] Jacksonville, Florida facility; excluding: all other employees, guards, and supervisors as defined by the Act.

WE WILL NOT cancel previously agreed-upon bargaining sessions.

WE WILL NOT insist on improper bargaining conditions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 15 days of the Union's request, bargain at reasonable times and places and in good faith with the Union as your exclusive bargaining representative with respect to wages, hours, and other terms and conditions of employment until a full agreement or a bona fide impasse is reached, and if an understanding is reached, embody the understanding in a written agreement. Upon the Union's request, such bargaining sessions shall be held for a minimum of 24 hours per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees. WE WILL submit written bargaining progress reports every 30 days to the compliance officer for Region 12, serving copies thereof on the Union.

WE WILL recognize the Union as your certified exclusive representative in the unit described above for 1 year commencing on the date we begin good faith collective bargaining with the Union.

WE WILL meet with the Union on agreed upon and scheduled bargaining dates.

PROFESSIONAL TRANSPORTATION, INC.

The Board's decision can be found at [www.nlr.gov/case/12-CA-101034](http://www.nlr.gov/case/12-CA-101034) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street NW, Washington, DC 20570, or by calling (202) 273-1940.



*Thomas W. Brudney, Esq.*, for the Government.<sup>1</sup>  
*Jon Goldman, Esq.*, for the Company.<sup>2</sup>

<sup>1</sup> I shall refer to counsel for the Acting General Counsel as counsel for the Government and the Acting General Counsel as the Government.

<sup>2</sup> I shall refer to counsel for the Respondent as counsel for the Company and shall refer to the Respondent as the Company.

## DECISION

## STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case involves allegations the Company, on February 13 and 25, and March 19, 2013, cancelled various previously scheduled bargaining sessions and has since, on or about February 13, 2013, refused to meet and bargain and has, refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of an appropriate unit of Company employees; and, has since on or about May 31, 2013, conditioned bargaining on the Union's agreeing that if a court of competent jurisdiction determined the Board lacked a proper quorum at the time of the Union's certification, any collective-bargaining agreement arrived at would be null and void and the Company would withdraw recognition of the Union, all in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (Act). I heard this case in trial in Jacksonville, Florida on August 8, 2013. The case originates from a charge filed on March 25, 2013, by the International Brotherhood of Teamsters Local 512 (Union). The prosecution of the case was formalized on May 31, 2013, when the Regional Director for Region 12 of the National Labor Relations Board (Board), acting in the name of the Board's Acting General Counsel, issued a Complaint and Notice of Hearing (complaint) against the Company. The Company, in its answer to the complaint, and at trial, denies having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross examine witnesses, and to file briefs. The Government called the only witness to testify here; namely, Union President and Business Representative James Shurling (Union President Shurling or Shurling). I observed Shurling testify, I find no reason to discredit his testimony, thus I rely on it. I have studied the whole record,<sup>3</sup> and based on the detailed findings and analysis below, I conclude and find the Company violated the Act essentially as alleged in the complaint.

## FINDINGS OF FACT

## I. JURISDICTION, SUPERVISORY/AGENCY STATUS AND LABOR ORGANIZATION

The Company, Professional Transportation, Inc., is an Indiana corporation with its principal office and place of business in Evansville, Indiana, and with places of business located in various states of the United States, including a place in Jacksonville, Florida where it has provided, and continues to provide, crew transportation services to CSX Corporation, Norfolk Southern Railroad Company, Amtrak and other railroad industry companies in the States of Florida and Georgia and in various other states of the United States. During the past 12 months, a representative period, the Company purchased and received at its Jacksonville, Florida facility, goods valued in excess of \$50,000 directly from points located outside the State

of Florida. During the same 12 months the Company performed services valued in excess of \$50,000 for customers located in states other than the State of Florida. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I find, that at times material here, General Manager Mike Murphy (General Manager Murphy or Murphy), Branch Manager Henry Scott (Branch Manager Scott or Scott) and Vice President Robert Tevault (Vice President Tevault or Tevault) were supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act. It is undisputed that Union President Shurling is an agent of the Union within the meaning of Section 2(13) of the Act.

The parties admit, and I find, the International Brotherhood of Teamsters, Local 512, is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## A. Facts

The parties entered a Stipulated Election Agreement on April 20, 2012, which established a representation election for May 16 and 17, 2012, in the following unit (Unit):

All full time and regular part-time over the road and local drivers working from the Respondent's [Company's] Jacksonville, Florida facility; excluding: all other employees guards and supervisors as defined by the Act.<sup>4</sup>

The Union prevailed in the May election by a vote of 44 to 23 with no void or challenged ballots. On June 5, 2012, Region 12's Director certified the Union as the exclusive collective-bargaining representative of the Unit. On that same date the Union, in writing, requested the Company provide dates to begin negotiations for an initial collective-bargaining agreement. On June 12, 2012, Company counsel, Ronald T. Pfeifer, informed the Union, in an email, that Company Vice President Tevault would be its contact for contract negotiations. On July 3, 2012, attorney Pfeifer advised Union President Shurling that Company Vice President Tevault had an unusually busy July and asked Shurling to supply August dates for negotiations. After various exchanges regarding bargaining dates the parties met for negotiations in Jacksonville, Florida, September 25, 2012. The Union presented the Company 33 noneconomic proposals at the September 25 bargaining session. The parties "went through" each proposal and the Union answered the Company's questions about the proposals. The Company, presented no proposals, but asked for time to digest the Union's proposals and prepare responses or counterproposals. The parties agreed to meet again on November 15 and 16, 2012.

At the November 15, 2012 bargaining session the Company offered no contract proposals nor responses to the Union's 33 noneconomic proposals. However, at the November 16, 2012 bargaining session the Company did make some counterproposals.

<sup>3</sup> Numerous exhibits were received without objection.

<sup>4</sup> There are approximately 70 employees in the unit.

After the November 2012 bargaining sessions the parties exchanged various emails starting on December 18, 2012, and, ultimately agreed to meet for bargaining on January 24, 2013. At the January 24, 2013 bargaining session the Company did not offer any new proposals but did make some counter-proposals. Union President Shurling expressed his concern bargaining “was dragging”<sup>5</sup> stating the parties needed to schedule several bargaining sessions going forward, explaining they needed to “put together” 2 and 3 rather than 1 or 2-day sessions. The parties agreed to meet for negotiations on February 21 and 22, and March 5, 6, and 7, 2013.

On or about February 11, 2013, Union President Shurling emailed Company Vice President Tevault to confirm the February 21 and 22 bargaining dates. On February 13, 2013, Company Vice President Tevault, in an email, notified the Union the Company was still working on proposals and their calendars hoping to have something soon and indicated the bargaining sessions scheduled for February 21 and 22, 2013, would not work for the Company and canceled those dates. On February 25, 2013, Tevault, in an email, notified the Union he had a conflict with the March 5, 6, and 7 bargaining dates and canceled those dates. Tevault asked about sessions for March 13, 14, and 15, 2013. Shurling responded he was “already booked” for those dates, but, suggested March 20, 21, and 22. On February 25, Company Vice President Tevault, emailed the Union, agreeing to meet for bargaining on March 21 and 22, 2013.

On March 19, 2013, Company counsel, Jon Goldman, wrote Union President Shurling as follows:

Our firm represents Professional Transportation, Inc. (PTI). Recently I learned that Local 512 is in labor contract negotiations with PTI.

In this regard, I mentioned the *Noel Canning* case, decided by the United States Court of Appeals for the District of Columbia, to Bob Tevault. I asked Bob to reschedule your March 21, 2013, bargaining session to allow me time to review the possible ramifications of *Noel Canning* with him.

Based on these circumstances, I am writing to notify you that Bob will not meet with you in Jacksonville on March 21<sup>st</sup> and either Bob or I will call you to discuss the course of negotiations. By this letter, PTI is not refusing to bargain at reasonable times and places with Local 512. PTI simply wishes to better understand the law in this complex situation as it moves forward in Jacksonville.

The Union had not received anything from the Company, prior to Goldman’s letter, about *Noel Canning*<sup>6</sup> issues. The Union showed for the March 21, 2013 bargaining session. The Company did not.

<sup>5</sup> Shurling concluded bargaining was “dragging” because there was a lot of time between sessions and when they did meet, it was for 1 or 2 days and for short periods during the meeting days.

<sup>6</sup> *Noel Canning v. NLRB*, 705 F.3d 490 (DC Cir. 2013), cert. granted 133 S.Ct. 2861 (2013) (No. 12–1281).

Union President Shurling and Company Vice President Tevault discussed additional bargaining dates via telephone on April 22, 2013, ultimately agreeing to meet on June 4, 5, and 6.

On April 24, 2013, Tevault sent Shurling the following email:

During our phone conversation on April 22nd we both said we were free to meet on June 4, 5 and 6 to bargain the contract. Because we have had difficulty setting dates and because we are both free on June 4, 5 and 6-I propose keeping these dates. I propose keeping these dates because while I understand your position on PTI raising the Noel Channing defense we are willing to reevaluate our position in a few weeks and, while I am making no promises, if this position changes we will have dates already agreed upon to meet. I think this makes sense for both parties. Let me know what you think.

On April 26, 2013, Union President Shurling emailed Company Vice President Tevault as follows:

I have these dates set and was under the impression they were confirmed during our telephone conversation on Monday 4/22/13. At any rate, I agree to keeping these dates and am looking forward to receiving your proposals/counter proposals in the interim. As to your position on Noel Canning, I do not believe that any credible defense or objections to our certification and/or bargaining exists. I am therefore requesting any objections or positions you or your attorney has filed with the NLRB or any other jurisdictional authority in this matter. I further do not agree that any future action in this matter will nullify or decertify the bargaining unit.

I look forward to bargaining and reaching an agreeable contract.

On May 31, 2013, Company Vice President Tevault emailed Union President Shurling reconfirming the bargaining dates of June 4, 5, and 6, 2013.<sup>7</sup> Tevault then added: “As we have discussed, PTI is bargaining subject to a reservation of rights based upon the reasoning expressed in the ‘Noel Canning’ line of federal appeals court cases issued by the DC and 3<sup>rd</sup> circuits. Unless I hear otherwise from you I’ll plan on seeing you at 9:00 on Tuesday to continue our contract negotiations subject to this reservation of rights.”

On June 3, 2013, Tevault again emailed Shurling asking if he was in agreement to continue the negotiations under the terms set forth earlier.

On June 3, 2013, Shurling replied, “I am in agreement to negotiate and will see you at 9 a.m. tomorrow however my position remains as previously stated in my April 26, 2013 email concerning your reservation of rights and noel canning.”

<sup>7</sup> It appears there was no communication between the parties from April 26 until May 31, 2013.

Late on the evening of June 3, 2013, when he arrived at the airport in Jacksonville, Florida, Company Vice President Tevault emailed Union President Shurling advising of his late arrival, and, indicating he would see Shurling the next morning for negotiations, but added:

I want to be sure you understand what rights PTI is preserving. They are as follows. If, prior to the time a CBA is agreed to and ratified, a court of competent jurisdiction determines the NLRB lacked a proper quorum at the time the Regional Director certified the bargaining unit in Jacksonville—PTI will stop negotiating and not recognize the election result. If after a contract is agreed to and ratified a court of competent jurisdiction determines the NLRB lacked a proper quorum at the time the Regional Director certified the bargaining unit, PTI will consider the contract as void and not recognize the union. If you meet with me tomorrow, you will by your conduct have agreed to accept this reservation of rights. I will have a copy of this message to hand to you tomorrow unless you tell me you do not or cannot meet.

Early the next morning, June 4, 2013, Shurling responded via email to Tevault's email of the night before stating in part:

Local 512 stands ready to negotiate in good faith to reach an agreeable contract. There is a certified bargaining unit and election in place. I have requested from you any legal action you or your Company has taken challenging the certification or unit and have been provided none. I am not aware of any legal or NLRB rulings which have nullified the certification. I am not in agreement to your bargaining terms and do not agree that my appearance to bargain stipulates such.

The parties met for their June 4, 2013 bargaining session. First, Company Vice President Tevault expressed the Company's position that they were reserving their rights under *Noel Canning* and that by bargaining the Union was stipulating its acceptance of "conditional bargaining." Union President Shurling testified he understood conditional bargaining to mean, as Tevault had expressed in his email; "that if *Noel Canning* was upheld, that they would be covered under *Noel Canning* and that no matter what we had accomplished, whether we were still in negotiations, all that would be null and void. And Bob even said to the fact that you know what if we got done with negotiations and the contract is ratified and goes in place; at that time the contract would be null and void and basically the Union would go away." Union President Shurling told Tevault, and the others, the Union would not agree to those conditions and did not agree with the Company's position. The Union was willing to continue negotiations but not with the conditional bargaining the Company wanted. Company Vice President Tevault after a telephone call "asked the Union to agree to the conditions that he had put across." Shurling again told Tevault the Union could not agree to the conditions that they were there to bargain a contract in good faith. Tevault responded that if the Union could not agree with the conditions "there was no need in proceeding forward." Union President Shurling and his negotiating team left the session, according to Shurling, because Tevault "had said there was no need in proceeding forward, so I took that to mean that they weren't going

to bargain with us." The Company made no bargaining proposals at this meeting nor did they seek clarification of any proposals the Union had made. The only item discussed at the June 4, 2013 bargaining session was whether the Union would agree to accept "conditional bargaining" as proposed by the Company.

Section 8(a)(5) and (d) of the Act requires an employer to bargain in good faith with the collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment, *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Section 8(d) of the Act, speaking to the obligation to bargain collectively, states; "For the purposes of this section, to bargain collectively is the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The Board has long noted the central importance of the obligation to meet for bargaining. In *J. H. Rutter-Rex Mfg. Co.* 86 NLRB 470, 506 (1949), the Board pointed out the obligation to bargain included the affirmative duty to "expeditious and prompt arrangements" for meeting and conferring. Agreement is impeded if the opportunity to meet and negotiate is frustrated or stifled by continued canceling of bargaining sessions. The Board in *Enjoi Transportation, LLC*, 358 NLRB No. 158 (2012), granted the Acting General Counsel's Motion for Default Judgment. In that case the parties were in negotiations for an initial collective-bargaining agreement, but the employer canceled three previously agreed to bargaining sessions over a 3-month time. The Board concluded, considering the employer's overall conduct, the employer's cancelling the three previously scheduled bargaining sessions demonstrated a failure and refusal to bargain in good faith on the employer's part with the employees designated bargaining representative. In *Calex Corp.*, 322 NLRB 977 (1997), the Board elaborated on the importance of the obligation that bargaining take place with expedition and regularity. More recently the Board held that the dilatory tactic of repeatedly canceling previously scheduled bargaining sessions violates the duty to bargain in good faith. *Camelot Terrace* 357 NLRB No. 161 slip op. p. 7 (2011). A party who limits (by cancelation) and/or delays bargaining sessions has not met its obligation to meet and bargain and, as such, violates Section 8(a)(5) of the Act.

I turn to the initial question of whether the Company's cancelling of seven consecutive previously scheduled bargaining sessions (February 21, 22, March 5, 6, and 7 and March 21 and 22, 2013), constitutes dilatory tactics in violation of the Act. I find the Company's specifically canceling bargaining sessions, constitutes dilatory conduct and is a failure of its obligation to meet and bargain. I note that although the Union was certified on June 5, 2012, and requested bargaining dates from the Company on that date, the Company's reply was that its chief negotiator, Vice President Tevault, had an unusually busy July and sought August bargaining dates. The first bargaining session did not take place until September 25, 2012. At the September 25 meeting the Union presented the Company 33 noneconomic proposals, however, the Company presented no proposals or counterproposals. When the parties met on November 15, 2012, the Company made no proposals or responses to the Un-

ion's proposals. The Company did, at the November 16, 2012 bargaining session, make some counterproposals. The parties, as of that time, reached tentative agreement on union security, gender and bulletin board language, and, agreed to combine the Union's witness clause proposal with its recognition clause proposal. Sometime in December 2012, the parties agreed to meet for bargaining on January 24, 2013. At that meeting the Company did not offer any new proposals but did make some counterproposals. At the end of the January 24 session the parties had not reached any other tentative agreements than those reached at their November 16, 2012 meeting. The Union raised the Company's delaying actions at the January 24 bargaining session when Union President Shurling expressed his concern bargaining was "dragging" and the parties needed to schedule several bargaining sessions going forward and meet for 2 or 3 day sessions rather than 1 or 2 day sessions. Although the parties agreed to seven additional bargaining sessions, the Company, before the agreed upon dates, cancelled each session.

Recapping, Company Vice President Tevault notified the Union on February 13, 2013, the bargaining sessions scheduled for February 21 and 22, 2013, would not work for the Company and canceled those dates. Tevault explained the Company was still working on their proposals and calendars hoping to have something for the Union soon. On February 25, 2013, Company Vice President Tevault notified the Union he had a conflict with the previously agreed upon March 5, 6, and 7 bargaining dates indicating those dates would not work for the Company and canceled those dates. The parties agreed to meet on March 21 and 22, 2013, however, on March 19, 2013, Company counsel Goldman notified the Union the Company was canceling the March dates because the Company needed time to review the possible ramifications of the *Noel Canning* case. Company counsel Goldman explained that by canceling the sessions the Company was not refusing to bargain at reasonable times and places.

I am fully persuaded, by the above outlined conduct, the Company demonstrated it considered negotiating with the Union, for an initial contract, an inconvenience for the Company. Explanations of busy calendars; working on proposals while hoping for something soon; belatedly realizing conflicts with previously agreed upon bargaining sessions; and, needing time to review legal ramifications of a particular court case are not valid justifications for cancelling seven consecutive previously scheduled bargaining sessions. Personal convenience, calendar conflicts and time for legal review of a single case do not take precedent over the statutory demand that the bargaining process take place with efficient promptness and regularity. I find the Company's actions constitute purposeful delay and constitutes a violation of its obligation to meet and bargain. The fact the parties actually met for bargaining on 5 occasions and tentatively agreed on 3 noneconomic contract proposals is not a defense to the refusal to meet and bargain violation I find here. Neither is it a defense to a violation, as found here, that the parties conducted the negotiations they did in a friendly manner.

I turn now to the Company's setting conditions on further bargaining with the Union. On March 19, 2013, the Company expressed its concerns to the Union about the *Noel Canning*

case and its impact on negotiations. The Union had not, prior to that date, received any concerns from the Company about *Noel Canning* issues. Although there were no negotiations in March, the parties agreed on April 22, 2013, to meet for further negotiations on June 4, 5, and 6, 2013. On April 24, 2013, Company Vice President Tevault emailed Union President Shurling suggesting they keep the early June bargaining dates open, as the Company, over the next few weeks, might be willing to reevaluate its position on *Noel Canning*. Tevault indicated in his email he understood the Union's position on *Noel Canning*. On April 26, 2013, Shurling responded to Tevault explaining he had already set aside the early June dates for bargaining and looked forward to receiving contract proposals from the Company in the interim. Shurling explained he did not believe any credible defense or objections to the Union's certification and/or bargaining status existed based on *Noel Canning*. Shurling further explained the Union could not agree that any future action in *Noel Canning* would nullify or decertify the bargaining unit. On May 31, 2013, Company Vice President Tevault emailed Shurling a reconfirmation of the June 4, 5, and 6, 2013 bargaining dates but added the Company was bargaining subject to its reservation of rights based upon the reasoning expressed in *Noel Canning*. On June 3, 2013, Tevault emailed Shurling asking if he was agreeable to negotiate under the Company's earlier expressed terms. Shurling responded he was in agreement to negotiate the next day but his position on *Noel Canning* remained the same as he had stated on April 26, 2013. Later that same evening, June 3, 2013, Tevault emailed Shurling the Company's reservations about, and conditions for bargaining which were that if, prior to a collective-bargaining agreement being arrived at or ratified, a court of competent jurisdiction determined the Board lacked a proper quorum at the time the Union was certified the Company would stop negotiating and not recognize the results of the representation election. Tevault continued explaining the Company's reservations by stating if a contract was agreed to and thereafter a court of competent jurisdiction determined the Board lacked a proper quorum at the time the Union was certified, the Company would consider the contract void and not recognize the Union. Tevault added if the Union met to negotiate it would, by its actions, be agreeing to accept the Company's conditions for bargaining. Union President Shurling responded the Union was ready to negotiate in good faith but, he was not in agreement with the Company's bargaining conditions and his appearance at negotiations did not stipulate the Union's agreement to the Company's conditions.

The next day, June 4, 2013, the parties met briefly and Company Vice President Tevault again stated the Company's conditions for continued bargaining. Shurling described the Company's conditions that if *Noel Canning* was upheld, the Company would be covered under *Noel Canning* and no matter what had been accomplished in negotiations all would be null and void and the Union would go away. The Union informed Tevault it was willing to continue negotiations but not with the conditional bargaining restrictions the Company insisted on. Tevault told the Union if it could not agree with the Company's conditions there was no need in proceeding forward. At that point the bargaining session ended.



Can the Company lawfully insist on the conditional bargaining restrictions it demanded without violating its duty to bargain in good faith with the Union. No it cannot. The Company here is simply attempting to challenge or test the Regional Director's certification of the Union as the bargaining representative of a unit of the Company's employees. The Union had already been validly certified on June 5, 2012. There has been no final determination the Board lacked a proper quorum at the time the certification issued. Thus, the certification and actions related thereto are binding on the parties and applicable here. There is no merit to the argument that a party's responsibilities under the Act are somehow relieved or suspended, or that a party may insist on conditional bargaining, while awaiting the outcome of pending litigation in the courts of appeals. *Bob's Big Boy Family Restaurants*, 264 NLRB 432, 434 (1982). The same, I am persuaded, applies to cases pending before the United States Supreme Court on certiorari. Even if the United States Supreme Court should uphold *Noel Canning* the matter likely would be remanded, through the courts, to the Board for further consideration in light of the Supreme Court's holding and the Board could, if it chose, reaffirm the Board's earlier actions related to the certification of representative. The Company's demand for conditional bargaining here violates its duty to bargain in good faith and I so find. Additionally, I note, the Company never challenged the Regional Director's certification of the Union in June 2012, but rather began negotiating with the Union for employees in the Unit. The Company, by its actions, voluntarily recognized the Union as the collective-bargaining representative of the unit employees. Finally, I further note, the Company never challenged the conduct surrounding the holding of the representation election nor the outcome of the election.

#### CONCLUSIONS OF LAW

1. The Company, Professional Transportation, Inc., is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, International Brotherhood of Teamsters, Local 512, is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full time and regular part-time over the road and local drivers working from the Respondent's [Company's] Jacksonville, Florida facility; excluding: all other employees, guards, and supervisors as defined by the Act.

4. At all times since June 5, 2012, the Union has been, and continues to be the certified exclusive bargaining representative of the employee in the above-described unit.
5. The Company has failed and refused to meet and bargain with the Union, and, has by its overall conduct, failed and refused to bargain in good faith with the Union as the exclusive collective bargaining representative of the Unit in violation of Section 8(a) (5) and (1) of the Act; by on or about February 13, 2013, canceling bargaining sessions scheduled for February 21 and 22, 2013; and, by on or about February 25, 2013, canceling

bargain sessions scheduled for March 4, 5, and 6, 2013; and, by on or about March 19, 2013, canceling bargaining sessions scheduled for March 21 and 22, 2013; and, by on or about June 4, 2013, conditioning bargaining with the Union upon the Union's agreeing that the results of all negotiations, including a collective-bargaining agreement, and the Regional Director's certification of representatives would be null and void, and, the Company would withdraw its recognition of the Union if the Supreme Court upheld the *Noel Canning* case.

#### REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. It is recommended the Company be ordered, upon request of the Union, to meet and bargain in good faith with the Union, and, if a collective-bargaining agreement is arrived at to reduce the same to writing and execute the agreement. Where an employer, as here, has failed and refused to bargain in good faith with a certified union, the Board will ensure that such a union has at least 1 year of good faith bargaining during which its majority status cannot be questioned by extending the certification year. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Under the circumstances here, I recommend that the 1-year extension shall commence to run from the date when good-faith bargaining begins. I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act, and the Company's obligation to remedy its unfair labor practices.

On these findings and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Company, Professional Transportation, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Failing and refusing to meet at reasonable times and from insisting on improper conditional bargaining and from failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative for its employees in the following appropriate bargaining unit:

All full time and regular part-time over the road and local drivers working from the Respondent's [Company's] Jacksonville, Florida facility; excluding: all other employees, guards, and supervisors as defined by the Act.

- (b) Canceling previously agreed upon bargaining sessions.
- (c) Insisting on improper bargaining conditions.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

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<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith and at reasonable times and places with the International Brotherhood of Teamsters Local 512, as the exclusive bargaining representative of its employees in the above-described bargain unit with respect to wages, hours, and other terms and conditions of employment and if an understanding is reached, embody the understanding in a signed agreement.

(b) Recognize the Union as the certified exclusive agent of its unit employees for 1 year commencing from the date good faith bargaining with the Union begins.

(c) Meet with the Union on agreed upon and scheduled bargaining dates.

(d) Within 14 days after service by the Region, post at its Jacksonville, Florida facility, copies of the notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since February 13, 2013.

Dated at Washington, D.C. October 22, 2013

<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights

WE WILL NOT fail and refuse to meet at reasonable times and places and WE WILL NOT fail to bargain in good faith with the International Brotherhood of Teamsters Local 512 as the exclusive collective-bargaining representative for our employees in the appropriate bargaining unit described below:

All full time and regular part-time over the road and local drivers working from the Respondent's [Company's] Jacksonville, Florida facility; excluding: all other employees, guards, and supervisors as defined by the Act.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union for an initial agreement by canceling meetings previously scheduled with the Union.

WE WILL NOT insist on improper conditions for bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the International Brotherhood of Teamsters Local 512 at reasonable times and places and in good for our employees in the above described bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL continue to recognize that the Union as the certified exclusive agent of our employees in the unit described above for 1 year commencing on the date good-faith bargain begins with the Union.

PROFESSIONAL TRANSPORTATION, INC.